

In order to document the fact that their sales to purchasers are sales for resale, retailers are obligated to obtain valid Certificates of Resale from their purchasers. See, 86 Ill. Admin. Code 130.1405. (This is a GIL.)

December 8, 1998

Dear Mr. Xxxxx:

This letter is in response to your letter dated June 9, 1998. We apologize for the delay in responding to your inquiry. The nature of your letter and the information you have provided require that we respond with a General Information Letter which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

In 1991, we encountered a problem in making purchases in Illinois for resale in Indiana and being asked to pay the Illinois Sales Tax.

On February 28th, 1991, a letter from your Staff Attorney, PERSON, quoted from Section 2C of the Retailers Occupation Tax Act, as well as Section 130.1410 of the Department's regulations. He advised us that we should provide the merchant with our Indiana Resale Number in lieu of an Illinois Resale Number and deliver and resell the merchandise in Indiana. This would be sufficient for the Illinois' merchant's records.

PERSON2 of the Chicago Sales Tax Office, gave an opinion to PERSON3 at the COMPANY in CITY, Ill. that this is not the correct policy and delivery into Indiana by truck is required, not our pick-up.

We have been an Indiana retailer for over 50 years and pick up thousands of dollars worth of merchandise yearly in Illinois, because we are located only 5 miles from the State Line. Many of our customers are schools, churches, and government agencies, all non-taxable. We cannot afford to pay sales tax in Illinois and not be able to recover the cost.

Please issue a certification of our tax exempt status so that we can provide it to those few suppliers who may balk at not collecting the Illinois tax.

In 1991, the Chicago office was issued a memorandum to clarify the matter and I believe that this should be repeated from the Springfield office.

Thank you for your prompt attention in the past and hoping for your early reply, we remain

Please note that Section 130.1410 of the Department's administrative rules that was referenced in your letter was repealed effective April 17, 1991.

#### INTERSTATE COMMERCE

When tangible personal property is located in this State at the time of sale (or is subsequently produced in this State) and then is delivered in this State to purchasers, the gross receipts from such sales are subject to Retailers' Occupation Tax liability if the sales are at retail. Such sales are subject to tax even if the purchaser, after receiving physical possession of the property in this State, transports or sends the property out of the State for use outside the State or for use in the conduct of interstate commerce. See subsection (a) of the enclosed copy of 86 Ill. Adm. Code 130.605.

However, gross receipts are not subject to Retailers' Occupation Tax liability when the gross receipts are from sales in which sellers are obligated, under the terms of their agreements with the purchasers, to make delivery of the property from a point in this State to a point outside this State, not to be returned to this State, provided that such delivery is actually made. Please note that sales are taxable even though purchasers that receive physical possession of the property in this State, transport or send the property out of this State for use outside the State or for use in the conduct of interstate commerce. See subsection (b) of the enclosed copy of 86 Ill. Adm. Code 130.605.

#### SALES FOR RESALE

Retailers in Illinois are required to either charge tax or document exemptions when they make deliveries in Illinois or the merchandise is picked up by the purchaser in Illinois. In order to document the fact that their sales to purchasers are sales for resale, retailers are obligated by Illinois to obtain valid Certificates of Resale from their purchasers. See the enclosed copy of 86 Ill. Adm. Code 130.1405.

Certificates of Resale must contain the following items of information.

1. a statement from the purchaser that items are being purchased for resale;
2. seller's name and address;
3. purchaser's name and address;
4. a description of the items being purchased for resale;
5. purchaser's signature and date of signing;
6. purchaser's registration number with the Illinois Department of Revenue; purchaser's resale number issued by the Illinois Department of Revenue; or, a statement that the purchaser is an out-of-State purchaser who will sell only to purchasers located outside the State of Illinois.

The definition of a "retailer maintaining a place of business in Illinois" is set forth at 86 Ill. Adm. Code 150.201(i), see enclosed. An out-of-State retailer maintaining a place of business in this State is required to register with the State as an Illinois Use Tax collector. See the enclosed copy of 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of its Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The final type of retailer is simply the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax law. A retailer in this situation does not incur Retailer' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's sales tax laws. The Supreme Court has set out a two-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due Process will be satisfied if the person or entity purposely avails himself or itself of the benefits of an economic market in a forum state. *Id.* at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause.

A physical presence does not mean simply an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative and it is immaterial for tax purposes that the representative's presence is temporary.

If the purchasers are not making sales in Illinois and have no nexus with Illinois, it is unlikely that the purchasers would be registered with Illinois. If that is the case, and if the purchasers have no contact with Illinois which would require them to be registered as out-of-State Use Tax collectors for Illinois (see above), then the purchasers could obtain resale numbers which would provide them the wherewithal to supply required numbers to Illinois retailers in conjunction with Certificates of Resale. In those instances, the holders of the resale numbers are not required to file tax returns with the Illinois Department of Revenue.

Section 2c of the Retailers' Occupation Tax Act contains the following provision that would allow "other evidence" to be submitted by a purchaser to document the fact that its sale is for resale:

"Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sales for resale or that a particular sale is a sale for resale." 35 ILCS 120/2c

Such evidence could consist of, for example, an invoice from purchaser to its customer, showing that the item was actually resold, along with a statement

from the purchaser explaining why it had not obtained a resale number and certifying that the purchase was a purchase for resale in Illinois. While "other evidence" is acceptable under the law, we prefer that the purchaser obtain a resale number and provide that number on a Certificate of Resale. There is a strong possibility that an Illinois tax auditor will scrutinize "other evidence" more closely than a Certificate of Resale.

I hope this information is helpful. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Terry D. Charlton  
Associate Counsel

TDC:msk  
Encl.